OCT 26 1990

No. 90-493

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

DAVID O. CONGER, LEONARD H. ALSENE, THOMAS S. HODGES, PATRICK R. LEON, DENNIS PFROMMER, STARLING ROBERTS, JR., DOMINIC M. SKINNER, and CHRIS YOUNG,

Petitioners,

v.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 199, AFL-CIO, and NATIONAL LABOR RELATIONS BOARD,

Respondents.

On petition for a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit

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PETITIONERS' BRIEF IN REPLY TO RESPONDENT LOCAL 199'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

Pursuant to Rule 15.6 of the Rules of this Court, petitioners David O. Conger *et alia* hereby respond to respondent Local 199's brief in opposition to their petition for a writ of certiorari.

ARGUMENT

I. Footnote 5 in Local 199's brief encapsulates the erroneous premiss that permeates all the union's arguments.[1] Contrary to that premiss, petitioners do *not* claim that a union may not bargain "on behalf of any newly hired employee or any nonunion employee in the bargaining unit unless prior notice to and consent of the individual has been accomplished". This petition raises *no* issues concerning newly hired employees or nonunion employees already in a bargaining unit. Quite the contrary. Three cases are distinguishable here:

A. A union seeks certification as the exclusive representative of a group of previously unrepresented employees who have already been hired under some definite terms and conditions of employment that constitute "property" rights for purposes of constitutional analysis. Once the union has been certified after an NLRB election under NLRA Section 9, the union, in collective bargaining, may enhance or diminish the value of the employees' terms and conditions of employment without violating any "property" right of those employees,[2] subject, of course, to the union's compliance with its duty of fair representation,[3] because the employees have theretofore been afforded sufficient procedural due process through the NLRA's election-machinery. This is not petitioners' case.

B. A union which has already been certified as the exclusive representative of a bargaining unit becomes the representative of a newly hired employee upon his *voluntary* entrance into the unit with the knowledge that the union is the representative thereof. Because the new employee had *no* pre-existent "property" right in a job not already subject to collective

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1 Brief in Opposition ("BO") at 8.

2 *Cf.* J.I. Case Co. v. NLRB, 321 U.S. 332 (1944).

3 *See* Steele v. Louisville & N.R.R., 323 U.S. 192 (1944).

bargaining through exclusive representation, neither the union nor the NLRB need afford him any procedural due process at all (although, as noted above, the union must satisfy its duty of fair representation). This is not petitioners' case, either.

C. A union which has already been certified as the exclusive representative of a bargaining unit seeks to extend its status by the "accretion"-doctrine to other, unrepresented employees already working under their own separate terms and conditions of employment that do constitute "property" rights, where those employees are *un*willing to join the union's unit and where the accretion results in substantial *losses* of contractual benefits by them. Because the involuntarily accreted employees are deprived of "property" rights under color of the NLRA, they are entitled to notice and hearing at appropriate stages in the accretion process. *This* is petitioners' case.

Pace Local 199, this Court's acceptance of petitioners' claims *in the accretion-context* would not "necessarily render the [NLRA] useless",[4] because it would simply require that additional parties—the employees objecting to, and victimized by, the accretion—be allowed to participate independently in the NLRB's accretion-proceeding, rather than being subjected without their knowledge and without any recourse to the fictional "representation" of the union (which is actually their antagonist on the accretion-issue) or of the employer (which the NLRA presumes has interests that irreconcilably conflict with those of all its employees on all issues relevant to unionization and collective bargaining).

II. Local 199's argument that petitioners "raise no constitutional claim" against it is doubly specious. *First*, petitioners explicitly argue that, if Local 199 had no duty of fair representation to afford them notice of the very accretion-proceeding that it effectively initiated by asserting its status as their NLRA Section 9(a) exclusive representative, then that section is uncon-

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[4] BO at 8 n.5.

stitutional—and therefore Local 199's pretended status is unconstitutional, too.[5] *Second*, even if (as Local 199 contends) petitioners' claim against it is not independent of their admittedly *constitutional* claim against the NLRB,[6] it remains a *constitutional* claim by nature, if in some sense derivative because it is asserted through petitioners' claim against the NLRB. No logical or legal reason exists to deny that, although a federal District Court might be unable to exercise jurisdiction over the NLRB because of some doctrine of administrative law peculiar to governmental agencies, it cannot adjudicate petitioners' claim against a joint constitutional-tort-feasor—Local 199—over which the court clearly has jurisdiction as a private organization.

III. Local 199 begs the question by pretending that it was not *formally recognized* as petitioners' NLRA Section 9(a) exclusive representative prior to the NLRB's decision on the accretion-petition.[7] The issue is not *formal* recognition by the NLRB, but Local 199's own assertion of exclusive-representational status *vis-a-vis* petitioners in the special context of accretion. If Local 199 may claim the *powers* of an exclusive representative over certain employees by accretion, so as to avoid the otherwise applicable requirement of an NLRA Section 9 election involving those employees, is it not estopped to disclaim the *duties* of an exclusive representative, and principally the duty of fair representation, without which exclusive representation would be palpably unconstitutional? And is not the imposition of that duty implied by the NLRA necessarily contemporaneous with the assertion by the union of the powers the duty circumscribes? But these questions, petitioners submit, answer themselves.

IV. Finally, Local 199 complains that petitioners demand that it bear "a *greater* duty toward [them] than either their

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5 Petition at 25-27.

6 BO at 4 n.3, 7-8.

7 *Id.* at 4-7.

employer who filed the [accretion] petition and espoused their position thereat; or the NLRB, under whose auspices and procedures the proceedings were conducted".[8] This complaint is feckless in the extreme.

First, in its self-assumed role as petitioners' exclusive representative Local 199 should bear a "greater duty" than their employer—which the NLRA presumes *never* "espouse[s] their position", and which is statutorily precluded from attempting to do so.[9]

Second, the statutory duty of the NLRB under NLRA Section 9(c)(1) to provide petitioners' with "an appropriate hearing upon due notice" is separate from, independent of, and self-evidently *more* extensive than Local 199's duty of fair representation to provide petitioners with notice of its participation in the accretion-proceeding only. And if, as noted above, federal courts lack jurisdiction to enforce such a duty against the NLRB, Local 199 has no basis for complaint against petitioners, but instead should join with them in seeking a determination from this Court that such a supposed jurisdictional bar is unconstitutional.

Actually, the District Court imposed a *lesser* duty on Local 199 than on the NLRB by dismissing petitioners' complaint against the union *without any motion on its part*. Even if the court was correct to dismiss the complaint against the NLRB on jurisdictional grounds, and arguably could have taken this action *sua sponte*, it had no possible *jurisdictional* basis for dismissing the complaint as to Local 199 even had the latter so moved. And the court took this action without notice of or hearing on the issue of Local 199's liability under the duty of fair representation, or

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[8] *Id.* at 8.

[9] *See* NLRA § 8(a)(1, 2, 3, & 5).

even on the court's own—clearly established—jurisdiction over duty-of-fair-representation claims under the NLRA.[10]

CONCLUSION

For the foregoing reasons, this Court should grant the petition and issue a writ of certiorari.

Respectfully submitted,

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[10] *See* Communications Workers v. Beck, 487 U.S. 735, 742-44 (1988).